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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1134.

KEN F. MANS, Individually and on Behalf of All Persons Employed by Sunray DX Oil Company and Sun Oil Company as of the Date of Merger of These Two Companies,
Petitioners,

v.

SUNRAY DX OIL COMPANY and SUN OIL COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR RESPONDENTS SUNRAY DX OIL COMPANY AND SUN OIL COMPANY IN OPPOSITION TO PETITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 72-1134.

KEN F. MANS, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS EMPLOYED BY SUNRAY DX OIL COMPANY AND SUN OIL COMPANY AS OF THE DATE OF MERGER OF THESE TWO COMPANIES,

Petitioners,

v.

SUNRAY DX OIL COMPANY AND SUN OIL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS SUNRAY DX OIL COMPANY AND SUN OIL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This brief is submitted on behalf of Sun Oil Company and Sunray DX Oil Company, respondents in *Mans v. Sunray DX Oil Company, et al.*, in opposition to the issuance of the writ of certiorari sought by petitioner Mans in that action.

OPINIONS BELOW.

The opinion of the court of appeals in *Mans v. Sunray DX Oil Company, et al.*, filed January 17, 1973, is unreported and is reprinted in Appendix D to the Petition. The order and judgment of the district court, filed respectively on May 20, 1971, and June 7, 1971, are unreported and are reproduced as Appendices E and F to the Petition.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1). The judgment sought to be reviewed in *Mans v. Sunray DX Oil Company, et al.*, was entered January 17, 1972.

QUESTION PRESENTED.

Were the lower courts correct in determining that a salaried employee, who quit his job rather than accept a transfer which he claims was caused by a merger involving his employer, does not have standing to sue under Sections 4 and 16 of the Clayton Act to assert a claim that the merger violated Section 7 of the Clayton Act and Section 1 of the Sherman Act.

STATUTES INVOLVED.

The only statutes involved in *Mans v. Sunray DX Oil Company, et al.*, are Section 1 of the Sherman Act, 15 U. S. C. § 1, and Sections 4, 7, and 16 of the Clayton Act, 15 U. S. C. §§ 15, 18 and 26. These statutes are set forth in Appendix J to the Petition.

STATEMENT OF THE CASE.

Jurisdiction of the district court was invoked under Sections 4 and 16 of the Clayton Act, 15 U. S. C. Sections 15 and 26. The complaint alleges that the merger of Sun Oil Company ("Sun") and Sunray DX Oil Company ("Sunray"), which became effective on October 25, 1968, was illegal under Section 1 of the Sherman Act (15 U. S. C. Section 1) and Section 7 of the Clayton Act (15 U. S. C. Section 18).

In his complaint, plaintiff claims to represent not only his own interest but those as well of a class said to consist of "persons similiarly situated who were employees of the Sunray DX Oil Company before that corporation was merged into the Sun Oil Company . . . [and] those persons who were employees of Sun Oil Company as of the date of the merger of these two corporations . . ." (R. Vol. I, p. 3). The complaint seeks sixty million dollars in money damages (twenty million dollars trebled) and, as additional equitable relief, the divestiture of Sunray (no longer extant) by Sun (Id., p. 17). Sun's answer to the complaint denied the material averments which purported to form the basis for plaintiff's claim of illegality with respect to the merger, and also raised affirmative defenses including plaintiff's lack of standing to sue (Id., p. 101-106).

On September 29, 1970, after the pleadings were closed, Sun's counsel took the deposition of plaintiff, the transcript of which appears in the record in the Court of Appeals as Volume II. The undisputed facts established by that deposition and the pleadings are as follows: Plaintiff was a salaried employee of Sunray compensated by salary alone and not by commissions or bonuses (R. Vol. II, pp. 33-34). He was initially employed by a corporate predecessor of Sunray at its Madison, Wisconsin, office as a lubrication engineer (Id., pp. 12-13). Shortly

thereafter, he moved to Tulsa and was based there for seventeen years with responsibilities in bulk lube oil sales. Plaintiff's salary and responsibility increased from time to time and by the date of the merger he was manager of compounder-blender sales (Id., pp. 14-27, 30-32). His duties throughout the period involved "a lot" of traveling, including in the latter years calling on customers throughout the mid-continent area (Id., pp. 27-28).

More than a year after the merger, Sun proposed a reorganization of the department of which plaintiff was a member. This reorganization was first explained to plaintiff by his superior, Anderson, the Manager of the Wholesale Department, in the Spring of 1970 (Id., pp. 43-44). Anderson indicated that he wanted plaintiff to become an Area Manager of the Department operating out of either Dallas or Houston (Id., pp. 52-56). Anderson told plaintiff that this was one of the most important asasignments in the Department and he wanted one of the best men to fill it (Id., p. 56). Moreover, Anderson offered to raise plaintiff's salary by 100 dollars per month immediately, rather than waiting for his anniversary date (Id., pp. 56-57). When plaintiff subsequently informed Anderson that he was not interested in going to Dallas, Anderson offered him comparable jobs in either Atlanta or Minneapolis, but plaintiff turned these down as well (Id., pp. 65, 92).

His employment terminated in April, 1970, when he elected not to accept one of the three new positions offered to him at higher salaries. (Id., pp. 52-57, 65, 92). The suit followed immediately on April 30, 1970.

Sun moved for summary judgment on the ground that the undisputed facts testified to by plaintiff demonstrated that plaintiff lacked standing to maintain the action (R. Vol. I, pp. 111-112). Plaintiff responded with two brief affidavits: One, his own setting forth certain of his subjec-

tive beliefs or feelings was apparently intended to correct impressions he feared had been left by his deposition (Id., pp. 115-116); and one by his counsel which was purely argumentative, not a recitation of facts (Id., pp. 113-114). Meanwhile, solely on the basis of the complaint and answer, plaintiff had moved for partial summary judgment asking the court to accept his contention that, essentially on considerations of size alone, the merger was *per se* illegal under both Section 1 of the Sherman Act and Section 7 of the Clayton Act (Id., pp. 108-110).

On May 20, 1971, after full briefs and argument by the parties on the two motions for summary judgment, the District Court (Judge Daugherty) filed an Order and Opinion denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment on the ground that the undisputed facts indicated that plaintiff's stated desire as to the place of his employment was the proximate cause of his termination rather than defendants' merger and that plaintiff therefore lacked standing to sue under Sections 4 and 16 of the Clayton Act. (Appendix to Petition 24-31, hereinafter cited as A. 24-31). Judgment in favor of defendants issued on June 7, 1971 (A. 32).

The Court of Appeals for the Tenth Circuit affirmed the judgment below on January 17, 1973, holding that there was no causal connection between the alleged antitrust violation and the injury claimed by petitioner and that the petitioner was not engaged in the area of the economy protected by the statutes under which he sued. It concluded therefore, that petitioner lacked standing to sue under Sections 4 and 16 of the Clayton Act. The Court of Appeals expressly did not review the correctness of the trial court's conclusion that appellant's desire as to his place of employment was the proximate cause of the termination of his employment (A. 21-23).

REASONS FOR DENYING CERTIORARI.

This case involves nothing more than the application of a well-settled principle to a particular set of facts. The "standing" rule applied by the courts below is based upon Sections 4 and 16 of the Clayton Act, 15 U. S. C. Sections 15 and 26, which require that a person must be injured "by reason of" or "by" an antitrust violation before he has standing to sue for that violation. The courts below applied this principle to the facts of this case and found that plaintiff lacked standing: (1) petitioner was not injured "directly" by the merger affecting Sunray and, (2) petitioner's termination was caused by his refusal to move to a new job at higher salary and not by the merger. The standing principle applied below does not conflict with decisions of this Court or with rulings of the other courts of appeals and the principle was correctly applied by the courts below to the facts of this case.

I. There Is No Conflict Among the Courts of Appeals on the Issue of Standing to Sue Under Sections 4 and 16 of the Clayton Act.

The courts of appeals have been uniform in limiting the persons permitted to sue for treble damages and injunctive relief for violations of the antitrust laws. This uniformity was recently recognized by this Court in its opinion in *Hawaii v. Standard Oil Co. of Calif.*, 405 U. S. 251, 263 n. 14 (1972):

> "The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. [citations omitted]"

Recognizing that injuries to stockholders, employees and lessors may conceivably be traced back to conduct violative of the antitrust laws, each of the courts of appeals has nonetheless determined that the right to sue is limited to those whose injuries are "directly" caused by the violation or who are in the "target" area of the violation. For example:

First Circuit:

> "The injuries set forth thus seem to fall within the class of indirect and speculative injuries for which plaintiff cannot recover under 15 U. S. C. A. §15." *Miley v. John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299, 303 (D. Mass.), *aff'd*, 242 F. 2d 758 (1st Cir.), *cert. denied*, 355 U. S. 828 (1957). *See also, Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956).

Second Circuit:

> "In determining whether a plaintiff has standing under §4 of the Clayton Act, the only relevant factor is whether the plaintiff is a 'target' of the illegal activity." *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292, 1296 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972). *See also, Billy Baxter Inc. v. Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971).

Third Circuit:

> "[T]he courts recognize that the Act does not give a right of action to every one who can trace a financial loss, however remote, to a violation of the antitrust laws." *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954). *See also,*

Kauffman v. Dreyfus Fund Inc., 434 F. 2d 727, 732-34, (3d Cir. 1970), *cert. denied*, 401 U. S. 974 (1971).

Fourth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' anititrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 419 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966).

Firth Circuit:

"If the damage was merely incidental or consequential, or if the defendants' antitrust acts are so removed from the injury as to be only remotely causative, the plaintiffs have not been injured 'by reason of anything forbidden in the antitrust laws' as contemplated by the Clayton Act." *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 487-88 (5th Cir. 1967), *quoting, South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 419 (4th Cir.), *cert. denied*, 385 U. S. 934 (1966).

Sixth Circuit:

"It is well established in the law that a supplier is too remote and too far removed from the direct injury to recover damages resulting from violation of the antitrust laws directed against the supplier's customer." *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F. 2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U. S. 907 (1963).

Seventh Circuit:

"The underlying question is: Could the State of Illinois bring a direct action against defendants? The

answer is 'no', because there was no direct proximate impact of the conspiracies on the consumers. The impact on them was remote and took the shape of allegedly higher rates paid for utility services. . . ." *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F. 2d 564, 567 (7th Cir.), *cert. denied sub nom. Illinois v. Commonwealth Edison Co.*, 375 U. S. 834 (1963).

Eighth Circuit:

"[T]here was directness of competition between Bergjans and Sanitary, that any recovery by Bergjans is not in the nature of a windfall, and the Bergjans' injury is something more than remote, is not derivative but direct, and is the proximate result of Sanitary's misdoing." *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F. 2d 679, 688-89 (8th Cir. 1966).

Ninth Circuit:

"[T]he rule is that one who is only *incidentally* injured by a violation of the antitrust laws,—the bystander who was hit but not aimed at,—cannot recover against the violator." *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 363 (9th Cir. 1955) (emphasis in original). *Accord, Hoopes v. Union Oil Co.*, 374 F. 2d 480, 485 (9th Cir. 1967).

Tenth Circuit:

"The newer and the older cases both present much the same terms to work with although expressed in somewhat different language. . . [W]e hold that under the authorities the plaintiff here has not alleged a cause of action under the Clayton Act because its position relative to the injuries resulting from the alleged acts of the defendants is too remote. . . [I]ts damages

resulting from the acts of defendants would come about 'indirectly', 'remotely', or as 'derivative damages.'" *Nationwide Auto Appraiser Service, Inc. v. Association of C. & S. Cos.*, 382 F. 2d 925, 928-29 (10th Cir. 1967).

In prior cases where simple salaried employment was the basis for the assertion of standing to sue for antitrust violations aimed at competition in the employer's market standing has been uniformly denied. *Centanni v. T. Smith & Son, Inc.*, 216 F. Supp. 330, 338 (E. D. La.), *aff'd*, 323 F. 2d 363 (5th Cir. 1963); *Martens v. Barrett*, 245 F. 2d 844, 846 (5th Cir. 1957); *Conference of Studio Unions v. Loew's Inc.*, 193 F. 2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U. S. 919 (1952); *Schatte v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U. S. and Can.*, 182 F. 2d 158, 167 (9th Cir.), *cert. denied*, 340 U. S. 827 (1950); *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 113 F. 2d 114 (2d Cir. 1940), *aff'g*, 30 F. Supp. 389, 391 (S. D. N. Y. 1939); *Loeb v. Eastman Kodak Co.*, 183 F. 704, 706, 709-10 (3d Cir. 1910); *J. O. Pollack Co. v. L. G. Balfour Co.*, 1973 CCH Trade Cas. ¶ 74,339 at p. 93, 592 (N. D. Ill. 1972); *Deaktor v. Fox Grocery Co.*, 332 F. Supp. 536 (W. D. Pa. 1971); *Bywater v. Matshushita Elec. Indus. Co.*, 1971 Trade Cas. ¶ 73,759 (S. D. N. Y.); *Contreras v. Grower Shipper Vegetable Ass'n.*, 1971 Trade Cas. ¶ 73,592 (N. D. Cal.); *Sargent v. National Broadcasting Co.*, 136 F. Supp. 560, 566 (N. D. Cal. 1955); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 916 (S. D. N. Y. 1955); *Gerli v. Silk Ass'n of America*, 36 F. 2d 959, 960-61 (S. D. N. Y. 1929); *Corey v. Boston Ice Co.*, 207 F. 465, 466 (D. Mass. 1913).

Numerous other decisions recognize, in dicta, that salaried employees lack standing to sue for violations aimed at competition in the employer's market. *Calderone Enter-*

prises Corp. v. United Artists Theatre Circuit, Inc., 454 F. 2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U. S. 930 (1972); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F. 2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U. S. 923 (1971); *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 487-88 (5th Cir. 1967); *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358, 363 (9th Cir. 1955); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F. 2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U. S. 936 (1956); *Waldron v. British Petroleum Co., Ltd.*, 231 F. Supp. 72, 84-85 (S. D. N. Y. 1964); *Schwartz v. Broadcast Music, Inc.*, 180 F. Supp. 322, 327-28 (S. D. N. Y. 1959); *Robinson v. Stanley Home Products, Inc.*, 178 F. Supp. 230, 233 (D. Mass.), *aff'd*, 272 F. 2d 601 (1st Cir. 1959); *Snow Crest Beverages, Inc. v. Recipe Foods, Inc.*, 147 F. Supp. 907, 909 (D. Mass. 1956); *Harrison v. Paramount Pictures, Inc.*, 115 F. Supp. 312, 317 (E. D. Pa. 1953), *aff'd*, 211 F. 2d 405 (3d Cir.), *cert. denied*, 348 U. S. 828 (1954).

II. The Allegedly Contrary Authorities Cited by Petitioner Are Consistent With the Decisions Below.

Petitioner argues erroneously that *Hawaii v. Standard Oil Co. of Calif.*, 405 U. S. 251 (1972); *Perkins v. Standard Oil Co.*, 395 U. S. 642 (1969); *Radovich v. National Football League*, 352 U. S. 445 (1957); *Flood v. Kuhn*, 407 U. S. 258 (1972) and several circuit court opinions are inconsistent with the decisions below.

The allegedly contrary circuit court authorities, *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484 (5th Cir. 1967) and *Nichols v. Spencer International Press, Inc.*, 371 F. 2d 332 (7th Cir. 1967), were actions brought by plaintiffs who, unlike petitioner, were commission sales agents who developed their own territories and customers and therefore had a business or property in the competitive area affected by the violation. The Fifth Circuit has specifically distinguished

between application of the standing rule to the facts of the commission sales agent cases and the application of the same rule to the facts of cases brought by salaried employees like petitioner. *Dailey v. Quality School Plan, Inc.*, 380 F. 2d 484, 487 (5th Cir. 1967).

Hawaii is inapplicable to petitioner's case except insofar as it reiterates the requirement under Section 4 of the Clayton Act that a plaintiff must be injured in his "business or property" in denying Hawaii's standing to sue as *parens patriae* for injuries to its general economy. Except for the *parens patriae* issue, the decision effects no change in the existing rules on standing under either Section 4 or 16 of the Clayton Act and, in fact, the opinion recites without comment in a footnote the conclusion that "the lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy for damages for all injuries that might conceivably be traced to an antitrust violation. [Citations omitted]" 405 U. S. at 263, n. 14. In affirming this standard rule, the Court cited *Roseland v. Phister Mfg. Co.*, 125 F. 2d 417 (7th Cir. 1942), which petitioner in his Petition cites as precedent for employee standing. In fact, the *Roseland* decision is simply another of the commission agent decisions discussed above and has no bearing on whether this petitioner, a salaried employee, has standing.

Petitioner's reliance on *Perkins v. Standard Oil Co., supra*, is equally misplaced. Perkins' situation does not remotely resemble plaintiff's status as an employee. Perkins owned both corporations directly affected by the illegal conduct; but more important, the court found on the record that his companies *and he* had been the specific target of the price discrimtination which constituted the violation. The Court stated that Perkins had been the "principle victim" and that he had been "directly injured." 395 U. S. at 649-50. That target analysis is at the heart of the Supreme Court's finding of injury and is entirely

consistent with the lower court's decisions on standing, including those in this action.

Plaintiff's citation of *Radovich v. National Football League, supra* and *Flood v. Kuhn, supra* again ignores the clear factual distinctions between those cases and his own action. In both cases, the plaintiffs were asserting a boycott by the leagues and clubs in question directed against them as players. Since they were the immediate object of the boycotts, they obviously were within the "target" area of the violation under any of the standing decisions of the courts of appeals.

III. The Individual Petitioner in This Action Can Establish No Causal Connection Between the Alleged Violation and His Injury, Since His Termination Was Due to His Voluntary Refusal to Transfer to a New Job at a Higher Salary.

Plaintiff suffered no "injury", unless by his voluntary rejection of a new job at a higher salary he injured himself. The District Court below concluded that "[petitioner's] stated desire as to the place of his employment was the proximate cause of his termination of his employment as a matter of law." (A. 30). The court of appeals did not review that conclusion (A. 23).

The facts support the lower court's conclusion. More than a year after its merger with Sunray, Sun elected to reorganize its Wholesale Department, and in so doing, decided to utilize plaintiff's services in a meaningful way and at a higher salary. Far from dismissing plaintiff, Sun offered him three alternative new assignments at an immediate increase in salary, the first being one which he admits was described to him as one of the most important in the reorganized department.

The cases cited *supra* fully support an argument that even had Sun decided to dispense with plaintiff's services the day after the merger, the resulting "injury" would be

too indirect in terms of the violation charged—a merger, the illegality of which, if established, would only arise from a significant probable or actual adverse effect upon competition, not on employees. *A fortiori,* whatever "injury" resulted from plaintiff's decision to leave Sun in a subsequent reassignment of jobs rather than to accept a new job in a new location at a higher salary is too remote, too much a happenstance consequence and too infected with plaintiff's own volitional act to meet any causation test.

The most basic test for standing to sue under both Section 4 and 16 of the Clayton Act is causation of the injury "by reason of" or "by" the unlawful conduct, and, on the facts of this case the district court was correct in concluding that petitioner cannot meet this prerequisite.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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